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ADMITTING THE PHOTOGRAPH OF DECEASED WIFE IN EVIDENCE IN SUIT BY HUSBAND FOR DAMAGES FOR LOSS OF SERVICES.

It seems that courts of justice of the present day are overly cautious about introducing the personal element into the trial of a case, seeking to classify a jury trial, for instance, with a calculation in mathematics. While this may be proper enough where the questions involved are purely mathematical and absolutely divorced from the intrusion of any element of a personal nature, still in a case where the value of a human life or a man's reputation is hanging in the balance, the personal equation is not only a proper but a very potent and necessary factor.

The case that has called this subject to our attention is that of *Smith v. Lehigh Valley Railroad Co.*, 69 N. E. Rep. 729, in which the New York Court of Appeals holds that the injuries suffered by a husband by the killing of his wife are to be compensated for on the basis of the monetary value of the services of the deceased to her husband and children, and that, therefore, the introduction in evidence of the photograph of a handsome woman is reversible error, on the ground that it could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury and awaken their sympathies. Justice Parker, in delivering the opinion of the court said:

"Such injuries are to be compensated for on the basis of the monetary value of the services of deceased to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury. Certainly the language employed in *Lipp v. Otis Brothers & Co.*, 161 N. Y. 559, 564, 56 N. E. Rep. 79, would seem to be applicable to the introduction of this photograph: 'Clearly, the testimony we have been considering could not render any serv-

ice in the case other than to awaken the sympathies and thus influence the judgment of the jurors in the direction of a greater award, nor is it reasonable to assume that any other result was expected from it.' In that case this court reversed a judgment obtained by a father, as sole next of kin, for pecuniary injuries resulting from his son's death. No one except the father was entitled to recover, and yet plaintiff was permitted to question a brother of deceased as to brothers, sisters, nephews, and nieces of deceased, and their necessities—testimony which pointed out opportunities plaintiff would have for making charitable use of any moneys left after satisfying his own necessities. The reason for the decision in that case calls for a decision in this, that evidence of such a character should not be received in cases where the personal element is not permitted by the statute to enter, as in this case."

While we have no particular fault to find with the decision of the court that the introduction of the photograph of the wife in evidence, under the facts in this case may have been irrelevant, we do not think, however, that its introduction was of such a nature as to materially affect the result, nor do we at all subscribe to the intimation in the court's opinion that the point of fatality in such evidence was the fact that it introduced a personal element. Suppose the wife in this case had not been killed, but severely injured, would she not have appeared on the stand, in person, and, under some circumstances, have been permitted to expose her injuries to the jury; or suppose, further, that the wife's physical condition was such as to prohibit her attendance at the trial, would not the trial court, at its discretion have been permitted to admit her photograph in evidence merely as evidence of her health and strength at the time of the injury? *Gilbert v. West End Street Railway Co.*, 160 Mass. 403, 36 N. E. Rep. 60. And certainly, under such circumstances, it has been held that a photograph is admissible to show the condition of the plaintiff after the accident. *Cooper v. St. Paul City Railway Co.*, 54 Minn. 379, 56 N. W. Rep. 42.

We do not mean to imply by the citation of these authorities that the photograph of the deceased wife in the principal case was admissible under the facts of that case. In-

deed, we are inclined to agree with Cullen, J., in his dissenting opinion when he says: "I can see no purpose for which the photograph of the deceased was competent evidence. There was no dispute as to her age, her health or physical condition. But it seems to me the error is of too little moment to justify a reversal of the judgment." Our object here is to carry out the idea of Justice Cullen a little further by attempting to show that no more injury was done to the defendant's case by the introduction of the wife's photograph than if the wife herself had been present and testified. The personal element would have no more affected the case in the one instance than in the other.

NOTES OF IMPORTANT DECISIONS.

WILLS—WHETHER WIDOW'S ELECTION TO TAKE UNDER A WILL CAN BE CONDITIONAL.—One of the most perplexing situations which sometimes comes to a widow is when she is compelled to elect whether she will take under the will or under the intestate law of the commonwealth. The difficulty lies generally in the obscurity of the terms of the will making it impossible to calculate accurately what the widow may expect under the will or under the court's construction of it. Has the widow under such circumstances the right to elect to take under the will conditioned on the court's construction of its terms being of a certain nature. The Supreme Court of Massachusetts has recently held that such an election is insufficient and of no effect. The court said:

We meet the question whether such a waiver, to take effect, must be absolute, or whether it may be contingent upon the decision that may afterwards be made of a doubtful question of law. We deem it pretty plain that a person contemplating such a waiver must determine for himself, in view of the facts as they are and the law as it is, whether he will waive the provisions of the will or not, and make a statement in writing accordingly; otherwise great uncertainty might be introduced into the settlement of estates of deceased persons. Parties interested as heirs or devisees or legatees would be troubled with doubts created by the surviving husband or widow in regard to their legal rights in reference to a condition whose existence was due to the filing of the writing. Embarrassments would arise, as in the present case, such that executors or trustees would not know how to perform their official duties without a decision and instructions from the court. It might happen that, if executors or trustees did not find it necessary to bring a suit to determine the legal questions raised by the filing of the paper, other persons interested in the estate might be left for years without knowledge whether the writing filed was or was not a waiver of the

provisions of the will, for there might be cases where the questions raised would concern the interests in remainder of those who would not, for a long time, be in a position to bring a suit to determine their rights. The surviving husband or widow is in as good a position to know the legal effect of a waiver as any one. If the law is plain in regard to the questions raised by a waiver, he ought to determine whether to file an effectual waiver. If the law is doubtful, he ought to resolve the doubt as well as possible for himself, and not to create a condition which gives rise to uncertainty, and then decline to act definitely until a suit has been brought by others, and the doubt dispelled by a decision of the court.

ANIMALS—GOOSE ON A RAILROAD TRACK AS AN "ANIMAL OR OBSTRUCTION."—It could not be said to be an unsound conclusion of law to hold that if an animal with all the instinctive virtues usually attributed to such creatures, were "goose" enough to go upon a railroad track in front of a rapidly moving train it should forfeit all its rights and privileges as an animal. It therefore follows that the goose itself, *ipso facto*, and because of it being the lowest type of animal intelligence, is not entitled to classification, in this regard, with other animals. This latter conclusion is not a dictum of our own, but rests on recent and authoritative judicial authority. Nashville & K. R. Co. v. Davis, 78 S. W. Rep. 1050. In that case it was held that a goose was not an "animal or obstruction" within the Tennessee code requiring the alarm whistle to be sounded on a locomotive, and the brakes to be put down on all railroad trains, and every possible means employed to stop the train to prevent an accident when an "animal or obstruction" appears on the track.

The Supreme Court of Tennessee, speaking through Wilkes, J., offers the following wise observations: "This is an action for damages against the railroad company for running over and killing three geese of the value of \$1.50. The owner of the geese lived about one mile from the railroad, but permitted them to run at large, and they went upon the railroad track near a public crossing. The engineer blew the whistle and rang the bell for the crossing, but there is no proof that he rang the bell or sounded the alarm for the geese. Whether the geese knew of this failure to whistle for them does not appear. We think there is no evidence of recklessness or common-law negligence shown in the case, and the only question is whether a 'goose is an animal or obstruction in the sense of the statute (section 1574, subsec. 4, Shannon's Compilation), which requires the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident when an animal or obstruction appears on the track. It is evident that this provision is designed, not only to protect animals on the track, but also the passengers and employees upon the train from accidents and injury. It would not

seem that a goose was such an obstruction as would cause the derailment of a train, if run over. It is true, a goose has animal life, and, in the broadest sense, is an animal; but we think the statute does not require the stopping of trains to prevent running over birds, such as geese, chickens, ducks, pigeons, canaries, or other birds that may be kept for pleasure or profit. Birds have wings to move them quickly from places of danger, and it is presumed that they will use them (a violent presumption, perhaps, in the case of a goose, an animal which appears to be loath to stoop from its dignity to even escape a passing train). But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. We do not mean to say that in the case of recklessness and common-law negligence there might not be a recovery for killing geese, chickens, ducks, or other fowls, for that case is not presented. Snakes, frogs and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed."

We cannot say that we are enthusiastic over the justice or the logic of the court's position in this case. We believe the line of demarcation has been too arbitrarily drawn. While birds and fowls in their natural state or under ordinary circumstances are able to avoid injury very readily the same statement is not true of the larger fowls which have been very highly bred for domestic purposes. It is a well-known fact among poultry fanciers that the highly bred Mammoth Bronze Turkey or Toulouse Goose is as far separated from and superior to the wild turkey of our western forests or the wild goose of our northern lakes as a pedigreed Poland China hog is to the Arkansas razor-back. A Toulouse goose for instance, highly bred, may be worth a hundred dollars to the owner. The best specimens often weigh thirty to forty pounds, and because of their great weight, their locomotion is slow and ponderous while their wings are absolutely useless. If it were only the "dignity" or pride of the goose that leads him to decline to hasten his movements to avoid a collision with a passing train, as the court in the principal case seems to intimate, the law might be justified in leaving him to his fate, but where his great weight and his inability to navigate the air is due to man's interference in breeding him for certain results, he deserves as much protection as a Jersey cow or a Short-horn bull.

FREE SPEECH AND FREE PRESS IN RELATION TO THE POLICE POWER OF THE STATE.

This brief discussion of the subject of the constitutional guaranty of freedom of speech and of the press, is based on the police power of the state to protect society from attacks on

its safety and to prevent moral degradation consequent upon the unrestricted publication and dissemination of vicious news matter. It involves to a degree the scope of such power and its limitation under the provisions of the federal constitution relating to the subject.

These provisions, or guarantees, are that every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse thereof, and that no law shall be made abridging freedom of speech or of the press, and provisions of similar import have been embodied in the constitutions of all of the states, a constitutional principle intended as a shield of protection to the free expression of opinion throughout every part of our land.

As understood in the beginning of our constitutional history, liberty of the press meant simply freedom from censorship. As stated in the early case of *Commonwealth v. Blanding*,¹ "all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers."

This guaranty recognized the free expression of opinion on matters of church and state as essential to the best operation of a free government, and recognizes also the right to the expression of opinion on all matters essential to the public welfare, and the right to discuss such matters rests on the necessity for a general knowledge of its operations by the people concerned in a government of this character, and the right of citizens of the United States to express freely their sentiments on all subjects, rests also on the principle of equal rights to all in the gift of property and the pursuit of happiness under the constitution.² So that all citizens of this country have equal right to use their mental endowments and property in such a manner as will not injure their fellow citizens or endanger the safety and morality of society.

Where the exercise of these faculties or the use of the property would be inconsistent with the good of the community, immunity

¹ 3 Pick. 313.

² See *Root v. King*, 7 Cowan (N. Y.), 628; *Conn. v. Buckingham* (*Thatcher's Cases*), Mass. 39.

from responsibility would be mischievous, and certainly not intended in the constitutional guaranty. The liberty sought to be protected in these constitutional safe-guards is not to lead to acts inconsistent with the peace and dignity of the people and the security of society. Freedom of speech and of the press does not include the unrestrained use of tongue or pen. The tendency of the press of this country is to publish sensational and often false accounts of individual wrongs and immoralities, painting in vivid colors, under big head lines, the filth of social degradation and crime, and even while deprecating this urges as a reason for it that the reading public demand it. Therefore, wherefore, the commercial idea must pander to the immoral. These publications may and should be suppressed under the general police power of the state.

Again we find newspapers that publish arguments and appeals to the passions and prejudices of persons, thus exciting and inflaming their naturally bad dispositions to the point of the commission of crime, and such crimes as that, the commission of which recently has cast the dark pall of shame over the whole country. The same might be said of the outrageous and inflammable utterances of individuals who under the assumed guaranty of constitutional protection for such utterances openly deride and menace the government and those in authority, advocating the resort to force to accomplish their ends. There is no warrant for the assumption of such immunity under the provisions of the constitution guarantying freedom of speech and of the press. When such publications or utterances strike at the public morals or public safety, there can be no question of the police authority of the state to interfere.³ In this connection the above authority says: "But while all previous restraints are forbidden by this provision of the constitution, the permissible restraints upon the freedom of speech and of the press are not confined to responsibility for private injury. All obscene or blasphemous publications may be prohibited, as tending to do harm to the public morals. So, likewise, may the publication of all defamatory statements, whether true or false, concerning private individuals, in whom

the public have no concern, be prohibited, as was the case at common law, and is now in some of the states, on the ground that such publications do no good and excite breaches of the peace. In neither case is there any private injury inflicted, but the harm to the public welfare is the justification of the prohibition."

The publication of that matter which is wholly vicious in its nature, whether true or false, and published for the purpose of pandering to the appetite of certain classes of society, was never intended as included within the guaranty of the constitution. In truth, freedom of speech and of the press like freedom of other actions, is necessarily limited by other provisions of the same instrument, and the notion that these broad guarantees of the right of free speech and free press was intended to erect a barrier to the prosecution of those persons and publications whose expressions and published accounts are generally vicious and degrading and a menace to the good order of society, is a mistake. It never was so intended, and it is proper time for the police authority of the state to be invoked in this behalf, to the end that society may be protected against a growing evil.

Let us see what has been done in some of the states in this connection. In Connecticut, in the late case of *State v. McKee*,⁴ the court held that the legislature has the power to declare that the publication and sale of a newspaper devoted to criminal news and stories of crime endangers the public morals and that the same may be prohibited, and it is immaterial whether the conduct described in the statute, which was the basis of the information, has been theretofore held insufficient to support an indictment at common law for nuisance or libel. The provision of the statute of Connecticut under which the prosecution of McKee was had,⁵ provides for the punishment of persons who shall sell or have in possession with intent to sell, papers devoted to the publication of criminal news, police reports and stories of crime. The court held that there was no violation of the provisions of the federal constitution, Article 1, sections 5 and 6, providing for freedom of speech and of the press.

⁴ 46 Atl. Rep. 410.

⁵ Public Acts 1895, ch. 205, sec. 2.

³ Tiedeman's Police Powers, vol. 1, p. 229.

In the above case the information was directed against the circulation of what was known as the "Waterbury Herald," of Waterbury, Conn., "a paper devoted to the publication and principally made up of criminal news, police reports, pictures and stories of deeds of bloodshed, lust and crime." A demurrer was filed to the information alleging that the prosecution could not stand because the act of the legislature restricts the constitutional right to publish the truth and that it was not alleged that the matter is obscene, blasphemous, scandalous or libelous. "There is no constitutional right to publish every fact or statement that may be true," said the court. "Even the right to publish accurate reports of judicial proceedings is limited." Concerning the publication of judicial proceedings, Judge Cooley, in his work on Constitutional Limitations,⁶ states the rule as follows: "If the nature of the case is such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication though impartial and full, will be a public offense and punishable accordingly." In ordinary cases not involving the publication of judicial proceedings the rule would be even more severe. Referring again to this Connecticut case, we see that the court intended to leave no room for doubt of its position on the main point, and it was the opinion of the court that if the specification in the demurrer relating to the blasphemous, scandalous or libelous character of the publication meant to imply that the power of the state to punish acts as injurious to public health, safety or morals, is limited to acts within the adjudicated scope of the common law offenses of nuisance and libel, such an implication is without a proper foundation. These common law crimes are based on the broad principle that conduct injurious to the public health and morals may be restrained and punished by the state, but if not so injurious they might go unpunished. Notwithstanding the unwritten law, these crimes or rather offences, like those of the common law, depend on legislative authority and may be restricted or extended by the same authority. In the common law prosecution of

⁶ p. 449.

the offense the question whether the conduct charged is injurious may be a question of fact for the jury. There are cases where the legislature of a state may withdraw from the offenses certain specified acts as not injurious, or may declare certain conduct to be injurious and make it a statutory offense. In the latter case the injurious character is determined by the legislative authority; and it is not then a question of fact involved in a prosecution under the statute. This follows the reasoning of the same court in *State v. Main*⁷ and *State v. Cunningham*.⁸

An act of the Kansas legislature to prevent the circulation and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct, was held to be no invasion of the provisions in the federal constitution.⁹ To the same effect is the case of *State v. Van Wye*,¹⁰ sustaining the constitutionality of an act of the Missouri legislature. The information in this case charged defendant with having sold and circulated newspapers "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women and immoral conduct of persons."

The prosecution in *Bank's* case was under an act of the legislature of 1891, entitled "An Act to Prohibit the Editing, Publishing, Circulating, Disseminating and Selling of Certain Classes of Newspapers and Other Publications,"¹¹ and it was claimed for defense that this act was unconstitutional, in that it was in violation of the provisions of the constitution, concerning liberty of speech and of the press and the further provision permitting the truth to be pleaded in justification in all actions of libel. The court said: "The act under consideration was not passed to prevent the publication of libels, nor to suppress papers indulging in such publications, but to prevent the publication and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct." And a little further along, in the opinion of this court, if the legislatures of several of the states would

⁷ 69 Conn. 123.

⁸ 25 Conn. 195. See also *Strohm v. People*, 160 Ill. 586.

⁹ *In re Banks*, 56 Kan. 242.

¹⁰ 136 Mo. 227.

¹¹ Act 161, Pub. Acts 1891.

act in the matter there would eventually be a diminution in the number of vicious publications in the country. "Without doubt," the Kansas court said, "a newspaper, the most prominent feature of which is items detailing the immoral conduct of individuals, spreading out to public view an unsavory mass of corruption and immoral degradation, is calculated to taint the social atmosphere and by describing in detail the means resorted to by immoral persons to gratify their propensities, tends especially to corrupt the morals of the young and lead them into vicious paths and immoral acts. We entertain no doubt that the legislature has power to suppress this class of publications, without in any manner violating the constitutional liberties of the press." This is the plain reasoning of common sense, and is the more logical because it is true. All individual liberties and privileges, whether constitutional or otherwise, are surrendered to the public weal.

Further, the acts of congress regulating the use of the mails for certain purposes, is a plain recognition of legislative authority to protect the decency and morality of society against a too broad construction of the constitutional freedom of speech and of the press, and the federal court has, in many cases, upheld the authority.¹² In the last named case above the court followed the former opinion in *ex parte Jackson*, and held that because of the constitutional provisions and the limited power of its authority over crimes generally does not mean that congress is absolutely destitute of any discretion as to what shall and what shall not be carried in the mails, and compelled to assist in the dissemination of matters condemned by its judgment. That congress has the right to determine how that body will act in matters involving the public morals where the agencies of the federal government are concerned.

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¹² *United States v. Harmon*, 45 Fed. Rep. 414. *Harmon v. United States*, 50 Fed. Rep. 921; *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110.

PHYSICIANS AND SURGEONS—PRACTICE WITHOUT LICENSE—MASSAGE AND PHYSICAL CULTURE.

STATE v. BIGGS.

Supreme Court of North Carolina, Dec. 18, 1903.

Act 1903, p. 1074, ch. 697, amending Code, § 3122, designating who are eligible to practice medicine and surgery, provides that, for the purpose of the act, the expression "practice of medicine or surgery" shall be held to mean "the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever," and excepts only midwives, nurses and persons who minister to and cure the sick or suffering by prayer. Held, that the act does not confer and is not intended solely to confer protection on the public, but attempts to confer a monopoly on the method of treatment of disease by doctors of medicine or surgeons, and is violative of Const. art. 1, § 31, prohibiting monopolies.

Patients have a right to use methods of treatment requiring less skill and learning on the part of the practitioner than is requisite to constitute a doctor of medicine or a surgeon, and a legislative act which attempts to deprive them of such right is not warranted by any legitimate exercise of the police power.

CLARK, C. J.: The defendant is indicted on a charge that he "did unlawfully and willfully begin, engage in, and continue the practice of medicine and surgery, and the branches thereof, for fee or reward, without having obtained a license so to do from the Board of Medical Examiners of the State of North Carolina." Upon the facts found, the court was of opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

The special verdict found that the defendant advertised himself as a "non-medical physician;" that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith;" that he advertises to cure by natural methods, without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand; he writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the State Medical Board, and claims no exemption, under the provisions of the act of 1903, as a nurse or midwife, nor as one curing by prayer; and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment, and received payment therefor, since the passage of chapter 697, p. 1074, Laws 1903, "To Define the Practice of Medicine and Surgery."

Section 3124 of the Code requires that every person who applies for license to practice "medicine or surgery or any of the branches thereof" shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine." There was added by sec. 2, ch. 117, p. 180, Laws 1885, the following provision: "And any person who shall begin the practice of medicine or surgery in this state for fee or reward, after the passage of this act, without first having obtained license from said Board of Examiners (meaning the State Board of Medical Examiners) shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery or any of the branches thereof, but shall also be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25, nor more than \$100 or imprisoned at the discretion of the court for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts, on the ground that every one had an "inalienable right to life, liberty and the pursuit of happiness," as our great declaration phrases it, and that by that guaranty it is the right of every one to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon sec. 7 of article 1 of our state constitution, which forbids exclusive privileges and emoluments to any set of men, and sec. 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the fourteenth amendment of the constitution of the United States, which prohibits any state "to deny to any person the equal protection of the law." There was undeniably great force in the argument on that side. The lawmaking power slowly, in this state and in others, yielded to the view that it could or should pass such act. In 1858-59 (Acts 1858-59, p. 356, ch. 258) it first incorporated "The State Medical Society," and authorized the above examination, and prohibited anyone to practice medicine or surgery or prescribe for the cure of diseases, for fee or reward, without such license, but was careful to add a proviso that no one who should practice without such license should be guilty of a misdemeanor, the only penalty being that if he practiced on credit he could not recover his fees in the courts. The law remained thus till the above recited act passed in 1885, and which was made prospective. The constitutionality of this statute was fully considered, and after a most able argument against it by counsel was sustained by this court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and impos-

tors, and in no sense the creation of a monopoly or special privilege." State v. Call, 121 N. C. 646, 28 S. E. Rep. 517. If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the legislature was prohibited by the constitution from enacting it, nor could the legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any state system of healing. State v. McKnight, 131 N. C. 723, 42 S. E. Rep. 580, 59 L. R. A. 187. After these decisions, moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guaranty that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated, if they chose, by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possess this right, and that the legislature could not, under the constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery," the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian," and the like—should be examined upon a course such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the board of examiners.

At the last session of the general assembly the following act (Act 1903, p. 1074, ch. 697) was passed amendatory of sec. 3122 of the code: "For the purpose of this act, the expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case or disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that this shall not apply to midwives nor to nurses; provided further that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis, and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis; provided this act shall

not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson, in *McAden v. Jenkins*, 64 N. C. 801, noted, as of common knowledge, and reiterated in *Railroad v. Jenkins*, 68 N. C. 505, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. The same construction can fairly be applied to this act amendatory of the charter of this corporation in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "'practice of medicine and surgery' shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." That is, the practice of surgery and medicine shall mean practice without surgery or medicine, if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says, "any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs on the courthouse square who banishes headache, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression, forbidding treatment "for fee or reward" by other than an M. D. "by any other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D. It is not even admissible to "minister to a mind diseased" in any method, or even dissipate an attack of the "blues," without that label, duly certified. Is not this creating a monopoly, and the worst of monopolies,

that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine?" Such examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guaranty that is given by his license that the M. D. is competent. But how about those who are too poor, or too ignorant, or too perverse, to wish that kind of treatment? Is it requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this state to remove corns or to plug teeth without full knowledge of the materia medica, or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomachache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the constitution.

Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s, it would necessarily follow that the legislature would have to prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M. D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the

only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, 15 centuries older than the Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa, in ancient Elam, there are found (sections 215-225) regulations of the medical profession, fixing a scale of fees, and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks, "Is there no balm in Gilead? Is there no physician there?" The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D., or prohibiting the use of such remedies altogether, neither of which results the legislature could have contemplated, and both of which are forbidden by the provisions of the constitution above cited.

In this case the defendant is found guilty of the following acts, and no more: (1) Administering massage baths and physical culture; (2) manipulating muscles, bones, spine and solar plexus; (3) kneading the muscles with the fingers of the hand; (4) advising his patients what to eat and what not. And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable, "unless done for fee or reward." There is

nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, materia medica, and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the state to regulate the "practice of medicine and surgery," and to throw around the public any reasonable protection against unfit members of that honorable profession, and provide against malpractice, but the general assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practice it. But it is not found here that the defendant is deceiving and injuring the public, or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It may be that if he were not there some of the patients might call in an M. D., but that is due possibly to the ignorance or perversity of the patients, who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases. The law is thus stated in *Lawton v. Steele*, 152 U. S. 137, 138, 14 Sup. Ct. Rep. 501, 38 L. Ed. 385: "The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said, on page 138, 152 U. S., page 501, 14 Sup. Ct. Rep., 38 L. Ed. 385: "In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public interests." See, also, *State v. Pendergrass*, 106 N. C. 667, 10 S. E. Rep. 1002; *Ohio v. Gardner*, 58 Ohio St. 599, 51 N. E. Rep. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785.

License is required for the practice of pharmacy, of dentistry, of law, and many other skilled professions. We have a state system of law, for the "law is the state," and laws are prescribed by the legislature, and we also have a state system of education. Yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale, or any other legal instrument whatever; nor is it made punishable to settle litigation out of court by arbitration or otherwise, without the aid of a lawyer, nor to teach in other than the state schools. Though there are many methods of treating diseases, among which the legislature is not authorized to select one as the state system, excluding all others, yet this act, if valid, would

make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment, upon examination of that system, thus denying mankind any relief from pain and suffering, except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M. D.'s themselves, nor by the courts. Judges are lawyers and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who eschew medicine and surgery have a right to object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one. His learned counsel contends that Acts 1903, p. 1074, ch. 697, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses and those who profess to heal by prayer, who minister to the sick for fee or reward, by any other method whatsoever, shall be construed to be practicing medicine or surgery, and then follows this language: 'provided further that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in, except pharmacy, materia medica, therapeutics and the practice of medicine, and, in addition, he is required to be examined on, as follows: 'histology, urinalysis and toxicology, regional anatomy, neurology, bacteriology, gynecology and physical diagnosis.' But it is remarkable that he is not required to pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations and osteopathic diagnosis." As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed course of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to

say that the acts of which he was convicted of doing "for a fee," to-wit, using massage baths, physical culture, manipulating muscles, bone, spine and solar plexus, and advising his patients as to diet, could be done as safely to the public, as far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practice osteopathy, and, of course, only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way. The term "practice of medicine and surgery" embraces probably the larger, and certainly by far the most profitable, part of the "treatment of diseases," but is not coextensive with the latter term, and cannot be made so, unless "surgery and medicine" are adopted as the state system of treatment—a monopoly—and all other methods are made indictable. On the other hand, the state medical society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners and practices which they would not wish to recognize. All the law so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Dr. Oliver Wendell Holmes, in an address before the medical society in Massachusetts, said: "If the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this state has said that out of 24 serious cases of disease, three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, he said, "Forbid them not."

Upon the special verdict, the defendant should be adjudged not guilty. Reversed.

WALKER and CONNOR, JJ., concur in result.

NOTE.—*Constitutionality of Legislation Limiting the Right to Practice Medicine or to Heal the Sick.*—The opinion of the court in this case is noteworthy for several reasons. First, it contains the most pronounced expression of doubt as to the constitutionality of legislation requiring medical practitioners to be examined and licensed by a state medical society

that has come to our notice anywhere; second, the statute construed by the court is remarkable as containing an express license to christian scientists to practice their theories without let or hindrance; third, the decision itself is a most scathing arraignment of the small-mindedness and bigotry of the medical profession, which seeks, by legislative influence, to bar from practice any other school or system of healing.

In many previous editorials we have discussed this subject from various standpoints and, in the face of adverse criticism from our contemporaries, have maintained conclusions on a line with those so ably substantiated by the court's opinion in the principal case. See 53 Cent. L. J. 3; 53 Cent. L. J. 361; 53 Cent. L. J. 459; 54 Cent. L. J. 122; 56 Cent. L. J. 1; 56 Cent. L. J. 189; 56 Cent. L. J. 191; 56 Cent. L. J. 261; 56 Cent. L. J. 403; 57 Cent. L. J. 183; 57 Cent. L. J. 423.

We have continually laid great stress on the point that all acts for the regulation of the practice of medicine were to be justified, if at all, only on the ground that they were necessary to protect the public against quack medical practitioners, but not against those who eschewed the practice of medicine altogether and advanced some new theory for the alleviation and cure of the sick. And to this position the authorities are gradually coming. For instance, such statutory regulations do not apply to christian scientists. *State v. Myloid*, 20 R. I. 632; *Evans v. State*, 9 Ohio Dec. 222. *Contra: State v. Buswell*, 40 Neb. 158. Nor do they apply to those who practice osteopathy. *State v. National School of Osteopathy*, 76 Mo. App. 439; *Nelson v. State Board of Health* (Ky. 1900), 57 S. W. Rep. 501; *Smith v. Lane*, 24 Hun (N. Y.), 632. *Contra: Little v. State*, 60 Neb. 749; *People v. Jones*, 92 Ill. App. 445. Nor to vendors of medicine who do not pretend to diagnose a case, although they may give advice. *State v. Van Doran*, 109 N. Car. 864; *Reg. v. Howarth*, 24 Ont. 561; *Commonwealth v. St. Pierre*, 175 Mass. 48. Nor is an optician who fits glasses within the purview of such legislation. *Smith v. People*, 92 Ill. App. 22.

The application by an oculist of a liquid to the eyes is not the practice of medicine, within the meaning of an indictment for practicing without a license, but is rather the practice of surgery. *United States v. Williams*, 5 Cranch. C. C. 62, Fed. Cas. No. 16,713. When surgery, therefore, is included in the prohibition of the statute the oculist also falls within the regulations therein provided. *Commonwealth v. St. Pierre*, 175 Mass. 48. It is no violation of such a statute for a person who does not hold himself out as a physician to advise, or give medicine to, a sick person, merely as a neighbor or friend, where no charge is made, and no compensation is expected for such services. But see *State v. Paul*, 56 Neb. 369. Where the statute provides that gratuitous services may only be rendered in an emergency, the fact that doctors have given up a case as hopeless does not create an emergency. *People v. Lee Wah*, 71 Cal. 80, 11 Pac. Rep. 851.

A ludicrous feature of this legislation came to the surface in the case of *State v. Vandersluis*, 42 Minn. 129, 43 N. W. Rep. 789, 6 L. R. A. 119. In that case the statute said that only properly qualified dentists should treat diseases or lesions of the human teeth or jaws. A competent surgeon assayed to treat a certain disease of the jaw involving the teeth and coming within the prohibitory terms of the statute. Of course, the dentists complained of the trespassing on their preserves but the court very wisely interpreted the purpose of the statute and held that where a surgeon

was as competent by training and study to treat certain diseases of the teeth and jaw as a dentist, his attempt to treat such a case could hardly be called a misdemeanor.

To show the malignity of spirit with which these statutes are often enforced it is only necessary to refer to the case of *State v. Kellogg*, 14 Mont. 451, 36 Pac. Rep. 1077, where the state board of physicians revoked the license of a practitioner, and, pending his appeal to the supreme court on the legality of their revocation, they prosecute him and secured a conviction against him for practicing without a license. In deciding the appeal the court very properly rebuked the zeal of the medical profession together with that of the prosecuting attorney by promptly setting aside the conviction.

The regulations of these statutes have been held to apply to midwives. *People v. Arendt*, 60 Ill. App. 89; to empirics, *Musser v. Chase*, 29 Ohio St. 577; to obstetricians, *State v. Welch*, 129 N. Car. 579; *Little v. State*, 60 Neb. 749; to magnetic healers, *People v. Phiffin*, 70 Mich. 6; and to promoters of opium and other drug cures. *Benham v. State*, 116 Ind. 112.

JETSAM AND FLOTSAM.

UNIVERSAL CONGRESS OF LAWYERS AND JURISTS.

Under the auspices of the Universal Exposition, St. Louis, 1904, and with the co-operation of the American Bar Association, a Universal Congress of Lawyers and Jurists will be held at St. Louis on Wednesday, Thursday and Friday, September 28th, 29th and 30th, 1904. The congress will be composed of:

(1) Delegates named by the governments of the world.

(2) Delegates from bar associations of the United States and kindred associations of other nations.

(3) Delegates from law colleges, named by the constituted authorities thereof.

(4) Such eminent judges, jurists and lawyers as may be specially appointed as delegates.

The congress is immediately to succeed the annual meeting of the American Bar Association for 1904, which is to be held at St. Louis, September 26th, 27th and 28th, 1904.

AMERICAN DELEGATES.

The American delegates are to be composed of:

(a) All federal judges, and all the judges of the appellate courts of last resort in the various states.

(b) The American Bar Association is to name 100 delegates.

(c) Each state bar association is to send delegates equal in number to the representation of the state in the House of Representatives of the United States, provided, however, that each state and territory shall be entitled to send at least five delegates.

(d) In those states where there are no state bar associations, the highest court of last resort of such state, or the judges thereof, shall name delegates equal in number to the representation of that state in the lower house of congress, provided, however, that they shall be entitled to name at least five.

(e) All American law schools attached to state universities, and those law schools which belong to the association of American law schools, are each to send from their faculty two delegates and two alternates.

The governments of the world, the foreign law associations and the foreign law colleges have been re-

quested to appoint such number of delegates to the congress as they may each determine, and advise the Director of Congresses, Universal Exposition, St. Louis, U. S. A., of the number of delegates appointed, their names and residences.

OBJECTS OF THE CONGRESS.

Among the objects of the congress are the consideration of:

First. The history and efficacy of the various systems of jurisprudence.

Second. Those questions of international, municipal and maritime law, which concern the welfare of all civilized nations.

Third. The hope of contributing to greater harmony in the principles and the forms of procedure upon which the law of civilized nations should be based.

Fourth. The bringing of lawyers and jurists from all parts of the world in contact for the purpose of exchanging views on the principles and methods of a just jurisprudence.

Fifth. The establishing of closer relations and associations between members of the profession upon which the administration of justice depends.

The meetings of the congress and of the association are to be held in the hall of international congresses on the exposition grounds. The proceedings of the congress are to be published and distributed to the members of the congress and the association. A more detailed program will be published at a later date.

LIST OF GOVERNMENT DELEGATES APPOINTED BY THE PRESIDENT OF THE UNITED STATES.

This list comprises the chief justice and associate justices of the Supreme Court of the United States; the presiding judges of the United States Circuit Courts of Appeal; the chief justices of the court of appeals and court of claims at Washington; the lawyers of the president's cabinet; the living ex-attorney generals; the solicitor general; the living ex-presidents of the American Bar Association; the presiding justices of the courts of our territories and foreign possessions; lawyers from the senate and the house of representatives of the United States, taken largely from the judiciary committees of those bodies, and eminent lawyers in various parts of the country.

Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Brown, Mr. Justice White, Mr. Justice Peckham, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day.

Hon. George F. Hoar, United States senate; Hon. John C. Spooner, United States senate; Hon. John T. Morgan, United States senate; Hon. John W. Daniel, United States senate; Hon. Charles W. Fairbanks, United States senate; Hon. Francis M. Cockrell, United States senate; Hon. Alfred B. Kittredge, United States senate.

Hon. John J. Jenkins, house of representatives; Hon. John Dalzell, house of representatives; Hon. Henry W. Palmer, house of representatives; Hon. Charles E. Littlefield, house of representatives; Hon. David A. DeArmond, house of representatives; Hon. Henry D. Clayton, house of representatives; Hon. John Sharp Williams, house of representatives.

Le Baron B. Colt, presiding judge, United States Circuit Court of Appeals, Bristol, R. I.; William J. Wallace, United States circuit judge, Albany, N. Y.; Marcus W. Acheson, United States circuit judge, Pittsburgh, Pa.; Nathan Goff, United States circuit judge, Clarksburg, W. Va.; Don A. Pardee, United States circuit judge, New Orleans, La.; Horace H. Lurton,

United States circuit judge, Nashville, Tenn.; James G. Jenkins, United States circuit judge, Milwaukee, Wis.; Walter B. Sanborn, United States circuit judge, St. Paul, Minn.; William B. Gilbert, United States circuit judge, Portland, Oreg.; Mr. Chief Justice Alvey, court of appeals, D. C.; Mr. Chief Justice Clabough, supreme court; Mr. Chief Justice Nott, court of claims.

Hon. John Hay, secretary of state; Hon. L. M. Shaw, secretary of the treasury; Hon. Wm. H. Taft, secretary of war; Hon. P. C. Knox, attorney general; Hon. Wm. H. Moody, secretary of the navy; Hon. Henry M. Hoyt, solicitor general; Hon. Wayne MacVeagh, Washington, D. C.; Hon. Richard Olney, Boston, Mass.; Hon. Geo. H. Williams, Portland, Ore.; Hon. Elihu Root, New York City; Hon. Judson Harmon, Cincinnati, Ohio; Hon. W. H. H. Miller, Indianapolis, Ind.; Hon. John W. Griggs, New York City.

Cortland Parker, Newark, N. J.; Simeon E. Baldwin, New Haven, Conn.; John F. Dillon, New York City; James C. Carter, New York City; Moorfield Storey, Boston, Mass.; James M. Woolworth, Omaha, Neb.; William Wirt Howe, New Orleans, La.; Joseph H. Choate, London, Eng.; Charles F. Manderson, Omaha, Neb.; Edmund Wetmore, New York City; U. M. Rose, Little Rock, Ark.; Francis Rawle, Philadelphia, Pa.; James Hagerman, St. Louis, Mo.; John Hinkley, 215 North Charles street, Baltimore, Md.; Frederick E. Wadhams, 34 Tweedle building, Albany, N. Y.; P. W. Meldrim, Savannah, Ga.; Platt Rogers, Denver, Colo.; Theodore S. Garnett, Norfolk, Va.; Wm. P. Breen, Fort Wayne, Ind.; M. F. Dickinson, Boston, Mass.; Alvin J. McCrary, Binghamton, N. Y.; George M. Sharp, Baltimore, Md.; Walter S. Logan, New York City; Everett P. Wheeler, New York City; Rodney A. Mercur, Towanda, Pa.; Edward Q. Keasbey, New York City; James D. Andrews, Chicago, Ill.; George B. Rose, Little Rock, Ark.; Amasa M. Eaton, Providence, R. I.; Henry St. George Tucker, Columbian University, Washington, D. C.; Francis Forbes, New York City; Ferdinand Shack, New York City; Jacob Klein, St. Louis, Mo.; A. B. Browne, Washington, D. C.; Frederick W. Lehmann, St. Louis, Mo.; John W. Noble, St. Louis, Mo.; Chas. Clafin Allen, St. Louis, Mo.; Charles Nagel, St. Louis, Mo.; Isaac H. Lionberger, St. Louis, Mo.; G. A. Finkelnberg, St. Louis, Mo.; J. M. Dickinson, Chicago, Ill.; Charles F. Libby, Portland, Me.; Wm. B. Hornblower, New York City; Alfred Hemenway, Boston, Mass.; James H. Hoyt, Cleveland, Ohio; Wheeler H. Peckham, New York City; George R. Peck, Chicago, Ill.; E. B. Kruttschnitt, New Orleans, La.; William D. Guthrie, New York City; Hon. John W. Foster, Washington, D. C.; Hon. Benj. F. Tracy, 71 Broadway, New York City; Hon. Don. M. Dickinson, Detroit, Mich.; A. S. Worthington, Washington, D. C.; George Turner, Spokane, Wash.; Hon. John G. Carlisle, New York City; Wilbur F. Boyle, St. Louis, Mo.; David T. Watson, Pittsburgh, Pa.; Samuel Dickson, Philadelphia, Pa.; Hon. J. B. Moore, Columbia University, New York City; John G. Johnson, Philadelphia, Pa.; Hon. Holmes Conrad, Washington, D. C.; Frederic R. Ooudert, Jr., 71 Broadway, New York City; Charles J. Bonaparte, Baltimore, Md.; Hon. John K. Richards, Cincinnati, Ohio; James H. Reed, Pittsburgh, Pa.; Francis J. Heney, San Francisco, Cal.; Frank B. Kellogg, St. Paul, Minn.; Thomas Patterson, Pittsburgh, Pa.; George Tucker Bispham, Philadelphia, Pa.; Seymour D. Thompson, New York City; Edward S. Robert, St. Louis, Mo.

Hon. Wm. H. Pope, associate justice, Supreme Court

of New Mexico, Roswell, N. M.; Hon. Edward Kent, chief justice, Supreme Court of Arizona, Phoenix, Ariz.; Hon. James Wickersham, U. S. district judge, Eagle, Alaska; Hon. Sanford B. Dole, U. S. district judge, Honolulu, Hawaii; Hon. Lorrin Andrews, attorney general, Honolulu, Hawaii; Hon. Wm. H. Hunt, governor of Porto Rico, San Juan, P. R.; Hon. Jose Severo Quinones, chief justice, Supreme Court of Porto Rico, San Juan, P. R.; Hon. Willis Sweet, attorney general, San Juan, P. R.; Hon. Luke Wright, governor of the Philippine Islands, Manila, P. I.; Hon. L. R. Wildley, attorney general, Manila, P. I.; Hon. Cayetano Arellano, chief justice, Supreme Court of the Philippine Islands, Manila, P. I.

BOOK REVIEWS.

GUNCKEL ON COSTS IN FEDERAL COURTS.

Almost all subjects of law connected with procedure in the federal courts are enshrouded in difficulty and obscurity, and among such subjects that of costs in federal courts is no exception. The profession will therefore welcome the new work on this subject from the pen and brain of P. H. Gunckel, of the Minneapolis bar. There is, indeed, a great need for a work on this subject. The federal statutes are very general and the equity rules quite as much so. In consequence the decisions in the various districts are in hopeless conflict and much labor is required to ascertain the prevailing rule as to any question. In speaking of the origin of the work Mr. Gunckel says in his preface: "This compilation of cases was not undertaken with a view to publication, but had its origin in an accumulation of memoranda made from time to time for use in presenting to the judges or clerks questions of costs between litigants, and its publication has resulted from the suggestion of members of the bar and clerks of court who desired copies of the compilation for their own use."

Printed in one volume of 493 pages and published by Keefe-Davidson Company, St. Paul, Minn.

MOHUN ON WAREHOUSEMEN.

This volume could hardly be said to be a text book of the law; on the other hand, however, it is more than a digest. The plan of the work is simply this: There are fifty chapters, representing the fifty states and territories of the Union from Alabama to Wyoming. Under the name of each state is given the statute law of that particular state on the subject of warehouses and warehousemen, set out in full. Then follow the decisions of the courts of that state arranged in a logical rather than alphabetical sequence. At the end of the book is a full and very exhaustive index which brings together all the law according to subject matter.

The compilation of this volume was undertaken by the American Warehousemen's Association, on the suggestion of the chairman of its committee on laws and legislation. When the work was completed it proved so valuable that it was determined to issue it in permanent form to the legal profession and to the warehousemen of this country as an authoritative statement of the present status of warehouse jurisprudence. The work was arranged and compiled by Mr. Barry Mohun, of the Washington (D. C.) bar.

Printed in one volume of 948 pages and published by the Banks Law Publishing Co., New York.

ABBOTT'S TRIAL BRIEF ON PLEADINGS.

Austin Abbott enjoys the high honor of having written the most successful works on trial practice and pleadings of any American law-writer. His works evidence great labor and are prepared with the greatest care and with a view to make the subject understood and accessible to the student by clear statement of the fundamental principles, and logical and suggestive subdivision of each subject, as well as to exhaust the authorities.

Mr. Abbott's Brief upon the Pleadings in Civil Actions is published in two volumes, the first volume treating of demurrers, the second volume having to do with issues of fact. The original edition of the work appeared in 1891 in one volume at which time Mr. Abbott had this word of explanation to make in his preface: "As in the previous volumes of this series, I have not sought to state all the cases, nor all the peculiarity of local statutory rules. My aim has been, looking at the actual practice in the courts as we see it in operation, to state the existing rules of general usefulness, and to support them with an adequate selection of authorities from all jurisdictions, and to guard them with a sufficient indication of any reasonable conflict of opinion now existing."

The new edition of this work was prepared under the supervision of Mr. Asa W. Russell. Of course the multiplication of authorities has necessitated the material expansion of this work so that it became necessary to divide the subject into two volumes. In the main the work of Mr. Abbott has been taken to represent sufficiently the law of the subject down to the time that he prepared his work, and the revision consists chiefly of bringing the subject down to date in the light of the great number of later decisions. One new chapter has been added—that upon Amendments of Pleadings.

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BOOKS RECEIVED.

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HUMOR OF THE LAW.

The following incident is said to have happened in Lord Justice Davey's court: Turning to a counsel who had been rising to dizzy heights of oratory for some time, his honor said: "Kindly state to the court the exact point of law that you are obscuring by your eloquence."

Mr. Jurydodger—"Your honor, I feel that I am not fit to be a jurymen."

Judge—"You appear to me to be unusually intelligent, sir."

Jurydodger—"But, your honor, I can't make head or tail out of what those lawyers say."

Judge—"Neither can I. Take your seat in the jury box."

Edwin James was one of the most brilliant English lawyers of his day, but he was always in financial difficulties. At one time he lived in some West End chambers, the landlord of which could never obtain

rent. At last he had recourse to an expedient which he hoped would rouse his tenant to a sense of his obligations. He asked him if he would be kind enough to advise him on a little legal matter in which he was concerned, and on James acquiescing, drew up a statement specifying his own grievance against the learned counsel and asked him to state what he considered the best course for a landlord to take under such conditions.

The paper was returned to the landlord the next morning with the following sentence subjoined:

"In my opinion, this is a case which admits of only one remedy—patience."

The town photographer was exhibiting in his window a large full length likeness which he had just made of a local member of the bar, standing in his favorite attitude with his hands in his pockets. All remarked on the likeness to the original, till an old farmer came along. "Taint nuthin like him at all," said he; "he don't never have his hands in his own pockets b'gosh."

Hank was brought before a county justice of the peace on a charge of stealing a hog, and three witnesses testified that they saw him commit the theft. Hank's lawyer then introduced ten witnesses who swore that they had not seen the accused steal the hog. Slowly and with fitting dignity the J. P. arose and said: "Only three say they saw the thief, and ten say that they did not see it. The weight of the evidence is clearly in favor of the accused. He is discharged."

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91. HEALTH—Expenses of Quarantining.—Under Ky. St. 1903, §§ 2047-2072, a county held liable for expense incurred by the county board of health in quarantining persons with contagious diseases.—*City of Bardstown v. Nelson County*, Ky., 78 S. W. Rep. 169.

92. HOMESTEAD—Leasehold Interest.—A leasehold interest, which is subject to sale on execution, may constitute a homestead.—*White v. Danforth*, Iowa, 98 N. W. Rep. 136.

93. HOMESTEAD—Sale by Husband.—An oral contract, made by a husband alone, for the sale of the homestead of himself and wife, is absolutely void.—*Stickley v. Widle*, Iowa, 98 N. W. Rep. 135.

94. HOMESTEAD—Trust Estates.—Wife's second husband held not entitled to homestead in lands held by her and her first husband as testamentary trustees for their children.—*Rivera v. Morris*, Ky., 78 S. W. Rep. 196.

95. HOMESTEAD—Wife a Necessary Party to Incumbrances.—Where the legal title to homestead is in the husband, it cannot be conveyed or incumbered, unless the instrument is signed and acknowledged by the wife, under Comp. St. 1903, ch. 36, § 4.—*Teske v. Dittberner*, Neb., 98 N. W. Rep. 57.

96. HOMICIDE—Conspirators.—Where, in a prosecution for homicide, it appears that defendant and others, acted with a common purpose, in concert one with the other to take the life of the deceased, each is guilty, no matter which did the killing, under Pen. Code, § 29.—*People v. Lagroppo*, 86 N. Y. Supp. 116.

97. HOMICIDE—Instruction as to Premeditated Design.—An instruction that the law does not presume a killing with a premeditated design, but that this may be inferred from the facts proved beyond a reasonable doubt, is a correct proposition of law.—*Cook v. State*, Fla., 35 So. Rep. 665.

98. HUSBAND AND WIFE—Bills and Notes.—Under V. S. 2844-2847, intermarriage of a woman holding note and the maker of the note did not render it void.—*Spencer v. Stockwell*, Vt., 56 Atl. Rep. 661.

99. HUSBAND AND WIFE—Contract for Separate Maintenance and Support.—Contract between husband and wife and a third party, made in view of the existing separation of the husband and wife, held to be an attempted agreement between the husband and wife for her separate maintenance and support.—*Carling v. Carling*, 86 N. Y. Supp. 46.

100. HUSBAND AND WIFE—Debts of Wife.—In the absence of express authority to wife to use his credit, a husband can only be held liable for debts incurred by her for jewelry, upon implication of agency arising from his duty to furnish necessities.—*McBride v. Adams*, 84 N. Y. Supp. 1060.

101. HUSBAND AND WIFE—Wife's Earnings.—Where a married couple take boarders into their home, and the

wife takes charge of the house, the profits derived from such business belong to the husband.—*Briggs v. Devos*, 84 N. Y. Supp. 1068.

102. **INJUNCTION**—Corporate Name.—Injunction is a proper remedy to prevent a corporation from including in its name the surname of an inventor already adopted and used by another corporation with his consent.—*Edison Storage Battery Co. v. Edison Automobile Co.*—N. J., 56 Atl. Rep. 861.

103. **INSANE PERSONS**—Appointment of Conservator.—The appointment under Gen. St. 1902, § 237, of a conservator for an incapable, held not affected by pendency of proceedings in another state to inquire into his mental condition.—*Appeal of Wentz*, Conn., 56 Atl. Rep. 625.

104. **INTOXICATING LIQUORS**—Illegal Seizure of Whisky.—In suit against dispensary constable for illegal seizure of whisky in transit, under general denial, he may allege and prove that the seizure was lawful, and that plaintiff was engaged in the illegal sale of liquor.—*Smith v. Lafar*, S. Car., 46 S. E. Rep. 382.

105. **INTOXICATING LIQUORS**—Prohibiting Sale.—Where there has been no election under the local option law to determine whether intoxicants should be sold, a municipality has no authority to prohibit entirely the sale of liquors.—*City of Shreveport v. P. Draiss & Co.*, La., 35 So. Rep. 727.

106. **JUDGMENT**—Correcting Record.—Where the clerk of the court omits to record a judgment for costs, the court has power to cause the omission to be supplied, and a record made showing a judgment for costs.—*Thomas v. Thomas*, Me., 56 Atl. Rep. 651.

107. **JUDGMENT**—Setting Up Former Judgment in Bar.—A plea in equity, setting up a formal judgment in bar, must set forth so much of the pleadings or proceedings in the former suit as will show that the same point was in issue.—*Keen v. Brown*, Fla., 35 So. Rep. 401.

108. **JUDGMENT**—Set-Off.—Where one judgment is in contract, and the other is in tort, the presumption is against the allowance of a set-off, and the party asking for it should show some equity in its favor.—*Leitz v. Hohman*, Pa., 56 Atl. Rep. 888.

109. **JURY**—Competency of Juror.—A member of the general venire may be called in and sworn, though absent when called, if he comes in before the jury is complete.—*State v. Forbes*, La., 35 So. Rep. 710.

110. **LANDLORD AND TENANT**—False Representations.—Where the lessee is induced by false representations of the landlord to lease the premises, and the landlord has falsely represented that the furnace is in good condition, such fact can be shown by defendant in an action for the rent.—*Bauer v. Taylor*, Neb., 98 N. W. Rep. 29.

111. **LANDLORD AND TENANT**—Notice to Quit.—Where a tenant was in possession of premises under a 3-year written lease, a 30-day notice to quit, served on him by the landlord, did not change the legal relationship of the parties, or in any way affect the rights of the tenant.—*Bent v. Renken*, 86 N. Y. Supp. 110.

112. **LANDLORD AND TENANT**—Rule of Ordinary Care.—The rule that the obligation of ordinary care on the part of a landlord does not extend to danger created by the tenants themselves held not to apply to obstructions created by the acts of tenants other than the person injured.—*Westner v. Smith*, 85 N. Y. Supp. 87.

113. **LANDLORD AND TENANT**—Value of Trees Removed.—In an action by a mortgagee in possession, the value of timber and grass taken from the mortgaged premises by the mortgagor or his assigns is a question for the jury.—*Heilbrook v. Greene*, Me., 56 Atl. Rep. 653.

114. **LIENS**—Payment by One Liable.—Taking of receipts in name of another, on payment of liens on land by the owner, held not to have kept the liens alive.—*Miller v. Arthur*, Va., 46 S. E. Rep. 323.

115. **LIFE INSURANCE**—Application Signed by Brother.—Notwithstanding articles of incorporation and by-laws of a mutual benefit life insurance association, application made and signed by brother of insured held not to

invalidate insurance.—*Thornburg v. Farmers' Life Assn.*, Iowa, 98 N. W. Rep. 105.

116. **MARRIAGE**—Separation from Bed and Board.—The fact that validity of marriage may be drawn in question in an action for separation does not change form of action, so as to entitle party to jury trial.—*Packard v. Packard*, 84 N. Y. Supp. 1090.

117. **MASTER AND SERVANT**—Assumption of Risk.—An experienced sewer digger, injured by the caving of a trench which he had previously stated was safe and did not need curbing, held to have assumed the risk of his injury.—*Lenderink v. Village of Rockford*, Mich., 98 N. W. Rep. 4.

118. **MASTER AND SERVANT**—Contract of Employment.—An employee held not required, in diminution of damages for breach of employment, to seek other employment; he having waited in reasonable expectation of being called into service at any time by the employer.—*Matthews v. Wallace*, Mo., 78 S. W. Rep. 296.

119. **MASTER AND SERVANT**—Discharge of Employee.—An employer may justify his discharge of an employee by a cause not known by him at the time of the discharge.—*Loveman, Joseph & Loeb v. Brown*, Ala., 35 So. Rep. 708.

120. **MASTER AND SERVANT**—Hair Caught in Unprotected Shaftings.—Servant held not to have assumed risk of her hair becoming caught in unguarded shaftings and pulleys over her head.—*Pierce v. Contrexville Mfg. Co.*, R. I., 56 Atl. Rep. 773.

121. **MASTER AND SERVANT**—Injuries to Third Persons.—Where one employed a contractor to move a building, and it was no longer on the highway, the owner of the building was not liable for the contractor's negligence in leaving a hook and chain in the highway.—*Wilbur v. White*, Me., 56 Atl. Rep. 657.

122. **MASTER AND SERVANT**—Negligent Killing of Brake-man.—In an action for death of servant, owing to failure of defendant railroad to comply with rules of interstate commerce commission relative to drawbars, held not necessary for plaintiff to show defendant's knowledge of the defect.—*St. Louis, I. M. & S. Ry. Co. v. Neal*, Ark., 78 S. W. Rep. 220.

123. **MASTER AND SERVANT**—Rights of Attorney Representing Executor and Remainderman.—The fact that the same firm of attorneys represents a life tenant under a will and the executor does not impose upon such attorneys any duty with reference to the rights of the remainderman.—*Rupp v. McLaehlan*, Iowa, 98 N. W. Rep. 153.

124. **MASTER AND SERVANT**—Suitable Lodgings for Servants.—Employer's failure to furnish a domestic servant with suitable lodging held a violation of his legal duty to furnish safe appliances.—*Collins v. Harrison*, R. I., 56 Atl. Rep. 678.

125. **MASTER AND SERVANT**—Vice-Principal.—An employee who directs an appliance moved by steam power is a vice-principal as to a person in a subordinate position.—*Evans v. Louisiana Lumber Co.*, La., 35 So. Rep. 736.

126. **MASTER AND SERVANT**—Who are Fellow-Servants.—Plaintiff, who was engaged in hauling away trash and rubbish made by carpenters in their work, was a fellow-servant with the carpenters and could not recover for negligence inflicted by their negligence.—*Johnson v. Metropolitan St. Ry. Co.*, Mo., 78 S. W. Rep. 275.

127. **MECHANICS' LIEN**—Separate Buildings.—A mechanic's lien held to attach to one of three buildings erected at the same time by plaintiff for defendant, though the amount of material for the building on which the lien was placed is not accurately ascertained.—*Halstead & Harmount Co. v. Arick*, Conn., 56 Atl. Rep. 628.

128. **MORTGAGES**—Absolute Deeds.—In an action to compel an accounting and for a reconveyance of land deeded absolutely, the burden was on plaintiff to establish that the deeds were intended as mortgages.—*Wright v. Wright*, Iowa, 98 N. W. Rep. 137.

129. MORTGAGES—Defenses to Foreclosure.—A mortgagor cannot set up as a defense to foreclosure that he had no title to the premises.—*State Mutual Builders' & Loan Ass'n v. Batterson*, N. J., 56 Atl. Rep. 703.

130. MORTGAGES—Foreclosure of Vendor's Lien.—Mortgage on goods, under which mortgagor sells them without accounting for proceeds, held void as to creditors.—*Gee v. Van Natta-Lynde Drug Co.*, Mo., 78 S. W. Rep. 288.

131. MORTGAGES—Payment to Mortgagee.—Mortgagee, which had assigned mortgage and then received payment through its financial officer, held liable to discharge mortgage.—*Barnes v. Long Island Real Estate Exch. & Inv. Co.*, 84 N. Y. Supp. 951.

132. MORTGAGES—Right of Redemption.—Where a mortgagee holds possession of the mortgaged premises for 20 years after the debt becomes payable to the exclusion of the mortgagor, without accounting, the mortgagor's right of redemption is barred.—*Munroe v. Barton*, Me., 56 Atl. Rep. 844.

133. MORTGAGES—Right to Cut Timber.—Permission given by a mortgagee to the mortgagor to cut timber, to pay taxes, insurance and interest on the mortgage, does not authorize the mortgagor to use the timber to pay other debts.—*Holbrook v. Greene*, Me., 56 Atl. Rep. 659.

134. MORTGAGES—Right to Redeem.—Independently of statute, a right of redemption may be assigned, and the right to redeem exercised by the assignee.—*Cooper v. Maurer*, Iowa, 98 N. W. Rep. 124.

135. MUNICIPAL CORPORATIONS—Assessment for Street Improvement.—An objector to assessments for street improvement, alleged to have been levied without jurisdiction of the assessors, held entitled to review the assessments by a suit in equity, and not limited to relief obtainable on *certiorari*.—*Donovan v. City of Oswego*, 86 N. Y. Supp. 155.

136. MUNICIPAL CORPORATIONS—Conflicting Claims for Public Lands.—Where the register of the state land office refuses to entertain a contest on the ground that the lands are not subject to purchase, the question can be brought up on appeal.—*State v. Smith*, La., 35 So. Rep. 584.

137. MUNICIPAL CORPORATIONS—Requiring Claims to be Exhibited Within Six Months.—A provision of a city charter requiring all claims for injuries to be presented within six months is a statute of limitations, which cannot be waived by the city officers, in the absence of express statutory authority.—*Van Auker v. City of Adrian*, Mich., 98 N. W. Rep. 155.

138. NEGLIGENCE—Care Required by Child.—In an action for the wrongful death of a child, there can be no recovery, whether he was *sui juris* or *non sui juris*, if he did not exercise such care as commensurate with his years and intelligence.—*Atchason v. United Traction Co.*, 86 N. Y. Supp. 176.

139. NEGLIGENCE—Defective Spark Arrester.—The fact that, after a fire alleged to have been caused by defendant's failure to equip his mill with a proper spark arrester, defendant made changes in the arrester, was not evidence of its defective condition prior thereto.—*Wager v. Lamont*, Mich., 98 N. W. Rep. 1.

140. NEGLIGENCE—Persons Riding With Negligent Driver.—The negligence of a driver of a vehicle is not to be imputed to one who rides with him by invitation.—*United Rys. & Electric Co. v. Biedler*, Md., 56 Atl. Rep. 813.

141. NOVATION—Promise to Pay Debt of Seller.—Where, on the sale of a business, the purchaser assumed a debt of the seller, a demand by the creditor on the purchaser for payment thereof constitutes an acceptance of the promise.—*Lyon v. Clochessy*, 86 N. Y. Supp. 245.

142. PARTITION—Compensation for Improvements.—Tenant in common held entitled to be compensated in

partition, though he was a remainderman, and made improvements during the existence of life estate.—*Shipman v. Shipman*, N. J., 56 Atl. Rep. 694.

143. PARTNERSHIP—Fraudulent Organization as a Defense to Firm Obligation.—In an action against members of a former firm on a firm obligation, defendants cannot set up fraudulent organization of the partnership as a defense.—*Johanning v. Wilson*, 86 N. Y. Supp. 7.

144. PRINCIPAL AND AGENT—Authority of Agent.—On an issue between a third person and the principal as to an agent's authority, the principal will be bound by the apparent interpretation which he has put upon the written appointment.—*D. M. Osborne & Co. v. Ringland & Co.*, Iowa, 98 N. W. Rep. 116.

145. PRINCIPAL AND AGENT—Exceeding Authority.—A principal held not liable to a transferee of a draft drawn on him by his agent in excess of his authority.—*Gray Tie & Lumber Co. v. Farmers' Bank*, Ky., 78 S. W. Rep. 207.

146. PRINCIPAL AND SURETY—Application of Payments.—Where a bank, which was the owner of two notes against W, one of which was signed by his wife as surety, elected to apply a credit on the note to which she was a party, it could not thereafter withdraw such credit without her consent.—*Mitchell v. Wheeler*, Iowa, 98 N. W. Rep. 152.

147. RAILROADS—Flagman's Duties.—It is negligence for a flagman to leave his post, knowing that an engine is approaching the crossing, without giving some signal of danger.—*Sights v. Louisville & N. R. Co.*, Ky., 78 S. W. Rep. 172.

148. RAILROADS—Implied License.—Use by the public of space between railway tracks with the knowledge of the company does not authorize an individual to be on the track or under cars thereon.—*Wagner v. Chicago & N. W. Ry. Co.*, Iowa, 98 N. W. Rep. 141.

149. RAILROADS—Injury to Licensee.—Defendant railroad held liable to one injured by defect in a path in general use over its right of way.—*Matthews v. Seaboard Air Line Ry.*, S. Car., 46 S. E. Rep. 335.

150. RAILROADS—Killing Animals on Track.—Mere fact that passenger train, which killed mules going onto track, was running at high rate of speed, held not to show negligence in action for their death.—*Galveston, H. & S. A. Ry. Co. v. Cassinelli & Co.*, Tex., 78 S. W. Rep. 247.

151. RAILROADS—Right of Way Fence.—Railroad company held to owe to owner of horse, permitted to pass into adjoining pasture, duty of maintaining lawful right of way fence through such pasture.—*Brown v. Missouri, K. & T. Ry. Co.*, Mo., 78 S. W. Rep. 273.

152. REWARDS—Division.—Reward offered by governor for arrest of man charged with murder held subject to division, pursuant to contract made between detective seeking out the alleged murderer and the officer making the arrest.—*Heather v. Thompson*, Ky., 78 S. W. Rep. 194.

153. SALES—Conditional Sale.—Chattel mortgage to secure antecedent debt held not protected against prior unrecorded contract of conditional sale.—*First Nat. Bank v. Reid*, Iowa, 98 N. W. Rep. 107.

154. SALES—Damages for Breach.—Seller, who sold goods which buyer refused to accept, was entitled to recover as damages difference between contract price and that for which goods sold.—*Blick v. Fabian*, 86 N. Y. Supp. 207.

155. SALES—Mailing of Notice.—In an action on contract of sale, evidence examined, and held insufficient to show that buyer had notified seller of shipment of goods in compliance with contract.—*Steinhardt v. Bingham*, 85 N. Y. Supp. 1044.

156. SPECIFIC PERFORMANCE—Contract Made While Intoxicated.—A contract for the sale of land held of such a nature and made under such circumstances that the vendee was not entitled to specific performance.—*Moetzel & Mutter v. Koch*, Iowa, 97 N. W. Rep. 1079.

157. **SPECIFIC PERFORMANCE**—Parol Agreement of Husband.—A parol agreement by a husband to devise property within a homestead, not signed and acknowledged by the wife, is not specifically enforceable.—*Teske v. Dittberner*, Neb., 98 N. W. Rep. 87.

158. **STATUTES**—Foreign Corporations.—A general revenue law will not be declared unconstitutional, on account of discriminative provisions, if they may be rejected and the law enforced without them.—*State v. Fleming*, Neb., 97 N. W. Rep. 1063.

159. **SUBROGATION**—Lien for Taxes.—Where a lien of the state for taxes is a subject of private ownership, the purchaser from the state takes it with the state's right of priority over liens for local assessments.—*White v. Thomas*, Minn., 98 N. W. Rep. 191.

160. **TAXATION**—Action to Recover Realty.—The pre-emption, "omnia rite" applies to tax sales, as well as sales under eviction, when no attack has been made on them until after great lapse of time.—*Corkran Oil & Development Co. v. Arnaudet*, La., 35 So. Rep. 747.

161. **TAXATION**—Bills Receivable.—Bills receivable for goods sold by a domestic corporation without the state, which had never been within the state, held not assets of the corporation, subject to franchise tax.—*People v. Miller*, 86 N. Y. Supp. 193.

162. **TAXATION**—Mortgagee's Right to Purchase at Tax Sale.—A mortgagee, not bound to pay the mortgagor's taxes, may buy the latter's property at tax sale.—*Moore v. Boagni*, La., 35 So. Rep. 716.

163. **TAXATION**—Unlisted Claims.—A contract for the sale of real estate held to create an absolute indebtedness in favor of the vendor, which was therefore taxable as a claim against him.—*Clark v. Horn*, Iowa, 98 N. W. Rep. 148.

164. **TRIAL**—Assault and Battery by Conductor.—The allowance of a question put to a witness in rebuttal in an action against a street railroad company for assault and battery committed by a conductor held to be within the discretion of the court.—*Birmingham Ry., Light & Power Co. v. Mullen*, Ala., 35 So. Rep. 701.

165. **TRIAL**—Commenting on Witnesses not being Produced.—It is customary to permit attorneys to comment on the absence of witnesses, or their nonproduction, when they are cognizant of the facts in the case.—*Chicago, B. & Q. R. Co. v. Krayenbuhl*, Neb., 99 N. W. Rep. 44.

166. **TRIAL**—Compensation for Services in Prosecuting Claim Against United States.—An agreement to pay an attorney a sum equal to one-third of the amount recovered on a claim against the United States held not within Rev. St. U. S. § 3477 (U. S. Comp. St. 1901, p. 2320).—*Knut v. Nutt*, Miss., 35 So. Rep. 686.

167. **TRIAL**—Interrupting Proceedings After Case has been Submitted.—After a case has been argued and submitted, and the judge has commenced to deliver the charge, it is too late to interrupt the proceedings and bring on delay to write a charge.—*State v. Forbes*, La., 35 So. Rep. 710.

168. **TRIAL**—Nonsuit, when Granted.—A nonsuit will not be granted when there is any evidence upon which a jury can properly find a verdict for the party who has the burden of proof.—*Lamkin & Foster v. Johnson*, N. H., 56 Atl. Rep. 750.

169. **TRUSTS**—Fraud of Administrator in Fiduciary Relationship.—Fiduciary relation held to exist between administrator and his cousin, a sister of decedent, in his care of her interest in estate.—*Schneider v. Schneider*, Iowa, 98 N. W. Rep. 159.

170. **TRUSTS**—Unauthorized Investments.—Trustee held not liable, on unauthorized loans, for more than the amount of interest received, where it was the going rate.—*In re Rowe*, 86 N. Y. Supp. 255.

171. **VENDOR AND PURCHASER**—Foreclosure of Vendor's Lien.—The purchaser at decretal sale having paid nothing, and bought at an inadequate price held not entitled to prevent a new trial.—*Gill v. Fugate*, Ky., 78 S. W. Rep. 189.

172. **VENDOR AND PURCHASER**—Knowledge of Purchaser's Agent.—Loose and indefinite knowledge as to the title possessed by the agent of the purchaser at a judicial sale could not destroy the force and effect of a subsequent contract.—*Felix v. Devlin*, 86 N. Y. Supp. 12.

173. **WAREHOUSEMEN**—Loss of Goods.—Patron of commission firm, delivering fruit to warehousemen for storage pursuant to a contract between the firm and warehousemen, held entitled to recover from the latter for negligent destruction.—*O'Connor v. Moody*, 86 N. Y. Supp. 214.

174. **WATERS AND WATER COURSES**—Pollution of Stream.—Pollution of stream by kitchen drainage held not to prevent injunction to restrain obstructions below.—*Fahnestock v. Feldner*, Md., 56 Atl. Rep. 785.

175. **WILLS**—Charge of Real Estate.—That the personality of testator's estate had been reduced by expenses of litigation, so that it was insufficient to pay legacies, was no reason why the real estate should not be resorted to in paying specific legacies.—*Horton v. Howell*, N. J., 56 Atl. Rep. 702.

176. **WILLS**—Contract to Make.—Where, after promise on sufficient consideration to devise property, the promisor, after performance by the promisee, conveys the property in fraud of the latter, an immediate cause of action to cancel the conveyance arises.—*Teske v. Dittberner*, Neb., 98 N. W. Rep. 87.

177. **WILLS**—Jurisdiction in Equity.—The jurisdiction of the court of chancery to construe a will will not be exercised where only a determination as to the devolution of title to realty is sought.—*Hoagland v. Cooper*, N. J., 56 Atl. Rep. 705.

178. **WILLS**—Rights of Legatee Under Contract for Preferential Rates.—An action for breaches of a railroad's contract with a shipper for preferential rates occurring in the shipper's lifetime held maintainable only by the shipper's executors as his personal representatives.—*Sullivan v. Louisville & N. R. Co.*, Ala., 35 So. Rep. 694.

179. **WILLS**—Construction of Will.—The word "residue," as used in a will, with regard to a given parcel of land, means simply the remaining acres of that parcel, and not the remaining estate in such parcel.—*Young v. Quimby*, Me., 56 Atl. Rep. 686.

180. **WITNESSES**—Corroboration When not Impeached.—A witness who has not been impeached cannot be corroborated by showing that he has made the same statement testified to at other times to other parties.—*Davis v. State*, Tex., 77 S. W. Rep. 451.

181. **WITNESSES**—Cross-Examination.—In prosecution for manslaughter, cross-examination by state as to lawlessness in community and circumstances under which defendants brother was shot held not error.—*Montgomery v. State*, Tex., 77 S. W. Rep. 788.

182. **WITNESSES**—Husband and Wife.—In an action by a married man against his wife to declare a trust in certain real estate, to which she holds the legal title, the husband is not a competent witness, under Code, § 33.—*Reed v. Reed*, Neb., 98 N. W. Rep. 76.

183. **WITNESSES**—Impeachment.—The impeachment of a witness by showing by parol evidence his former conviction of a larceny is harmless, where the record of conviction is afterwards introduced.—*Wilson v. State*, Tex., 78 S. W. Rep. 232.

184. **WITNESSES**—Reputation of Accused.—Where a witness testifies that he knows the reputation of accused, and that it is good, he may be asked on cross examination if he had not heard that defendant had been guilty of specific acts of bad conduct.—*Cook v. State*, Fla., 35 So. Rep. 665.

185. **WITNESSES**—What may be Shown on Cross-Examination.—Plaintiff in an action for rent held entitled, on the issue of waiver by defendant of a condition on which the lease was executed, to show that defendant did what, on cross-examination, he said he did not do.—*Lurie v. Levy*, 86 N. Y. Supp. 174.